



Report on HB 2352: Broadband Conduit

House Bill 2352 (Marshall, D.) was referred to the Joint Commission on Technology & Science (JCOTS) for study by the 2015 Session of the General Assembly. At the direction of JCOTS, staff held a work group meeting on June 10, 2015 to discuss HB 2352, and the issues it raised, with interested parties. Attendance was open to all interested parties, and included representatives from Verizon, Columbia, Virginia Oil & Gas, Washington Gas, Dominion, Century Link, the Virginia Municipal League, the Virginia Association of Counties, and the State Corporation Commission.

As introduced, HB 2352 would require "any person that installs pipeline that crosses more than one county or the Commonwealth's border [to] equip such pipeline with conduit capable of housing fiber optic cable." The bill further requires the person installing the conduit to bear the cost of installation, but would allow such person to lease the conduit to broadband providers.

Work group attendees raised several concerns about the bill as introduced, and ultimately recommended that JCOTS not recommend the bill for consideration by the 2016 Session of the General Assembly. The issues raised included concerns regarding safety, right-of-way acquisition, federal preemption, infrastructure needs, and cost recovery. Each of these issues will be discussed in more detail below.

SAFETY

The bill generically refers to "pipeline" and thus would include natural gas and oil pipelines. The inherent risks associated with digging near these types of pipelines pose legitimate safety concerns as a ruptured oil or natural gas pipeline could be life threatening. Once the conduit is laid, service providers could install fiber-optic cable. However, there would be little to no oversight to ensure that those who later install the cables in the conduit are properly trained and take adequate safety precautions.

ACQUISITION OF RIGHT-OF-WAYS

Questions were raised during the discussion as to whom would be responsible for acquiring the rights to lay the extra conduit. Typically, easements that are granted for pipeline projects only allow for the specific type of pipeline to be constructed and maintained. Installing conduit in addition to the pipeline would require consent from all affected property owners. For example, a gas company's easement for installing pipeline applies only for the provision of gas services, not telecomm services. The utility or interstate pipeline developer may have to use eminent domain to acquire the pipeline easement. It will not, however, be permitted to condemn for purposes of installing

broadband conduit or for any other purpose other than its pipeline. Moreover, at the time the pipe is laid, a broadband provider interested in utilizing conduit in that same area may have yet to have been identified. Therefore, it is unclear how the consent for laying conduit in that particular easement might be obtained.

FEDERAL PREEMPTION

The Federal Energy Regulatory Commission has authority over the location, construction, and operation of interstate pipelines, which could preclude the laying of conduit with pipelines that cross the Commonwealth's border. The right-of-way for intrastate pipelines through federal lands are also governed by federal law that might preclude the installation of conduit.

INFRASTRUCTURE NEEDS

Virginia already has an extensive broadband backbone -- the current challenges of the Commonwealth involve distribution of broadband services to rural areas off of the backbone (the "last mile"), and areas of "dark fiber" that are not currently being utilized. The bill, as introduced, would not take into account where current needs for expanded infrastructure exist. It is feasible that new conduit laid in accordance with the bill might be redundant, or might be in a highly-served area. Alternatively, conduit might be laid in an area that does not connect up with any existing infrastructure, thus rendering it useless.

A better approach might focus efforts only on areas with a demonstrated need for broadband infrastructure deployment. However, this leads to further questions as to who determines and oversees where the need exists.

COST RECOVERY

The bill requires that whoever installs the pipeline is responsible for bearing the cost of conduit installation. For state regulated utilities, cost recovery could be subject to State Corporation Commission approval. Such approval is speculative at best given that the conduit would have no relationship to the utility's certificated services. If approved, the costs could ultimately be borne by all jurisdictional customers of that utility, including, presumably, many who would not benefit from the conduit being installed. Further, in order for telecom companies to install cable, it has to make economic sense for them to provide broadband in the area the conduit was laid. If there are not enough potential subscribers to allow telecoms to recover the cost of laying fiber and achieve a profit, there will just be empty conduit.

CONCLUSION

Because of the above concerns and considerations, the work group did not advocate that JCOTS recommend HB 2352 for consideration by the 2016 Session of the General Assembly. The work group did recommend that the laudable concept of facilitating efficient broadband deployment via state, local, and private communication, coordination, and cooperation be further considered by the Broadband Advisory Council, in conjunction with the Virginia Municipal League and the Virginia Association of Counties. At its August 19, 2015 Meeting, JCOTS, declined to take further action on HB 2352, but did recommend that the concepts raised in the bill be referred to the Broadband Advisory Council for further review and discussion.